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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID BALDUS PHILLIPS,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:09-CV-00377-RCJ-(VPC)

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#9), respondents' motion to dismiss (#16), petitioner's opposition (#30), and respondents' reply (#31). The court grants the motion in part because petitioner has not exhausted his available state-court remedies for ground 4 of the petition.

Pursuant to a plea agreement, the Second Judicial District Court of the State of Nevada convicted petitioner of one count of first-degree murder with the use of a deadly weapon. The court sentenced petitioner to life imprisonment with the possibility of parole after 20 years for the murder and to an equal and consecutive sentence for the use of a deadly weapon. Ex. 136 (#23). See also Nev. Rev. Stat. § 193.165 (2005). Petitioner filed untimely notices of appeal, and the Nevada Supreme Court dismissed the appeal for lack of jurisdiction. Ex. 161 (#23).

Petitioner filed a post-conviction habeas corpus petition in the state district court. Ex. 160. After an evidentiary hearing, the court determined that petitioner had been deprived of his right to a direct appeal, and the court allowed petitioner to file a supplemental brief that raised any issues that he could have raised on direct appeal. Ex. 206, pp. 79-82 (#24). After the supplemental briefing, the court

1 denied the petition. Ex. 220 (#24). Petitioner appealed, raising both direct-appeal and post-conviction
2 issues. Ex. 234 (#34). The Nevada Supreme Court affirmed. Ex. 238 (#24).

3 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must
4 exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a
5 petitioner must fairly present that ground to the state’s highest court, describing the operative facts and
6 legal theory, and give that court the opportunity to address and resolve the ground. See Duncan v.
7 Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459 U.S. 4, 6 (1982).

8 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies
9 only if he characterized the claims he raised in state proceedings specifically as federal claims. In short,
10 the petitioner must have either referenced specific provisions of the federal constitution or statutes or
11 cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original),
12 amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that applies federal constitutional
13 principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir. 2003) (*en banc*). “The
14 mere similarity between a claim of state and federal error is insufficient to establish exhaustion.
15 Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and
16 the right to a fair trial, are insufficient to establish exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106
17 (9th Cir. 1999) (citations omitted).

18 In ground 1, petitioner argues that his guilty plea was involuntary, pursuant to the Fourteenth
19 Amendment and other provisions, because he was coerced into pleading guilty to keep his mother from
20 being prosecuted. Respondents argue that petitioner did not present the claim to the Nevada Supreme
21 Court as an issue of constitutional law. Regardless of petitioner’s presentation, in determining that the
22 guilty plea was knowing and voluntary, the Nevada Supreme Court relied upon Byrant v. State, 721 P.2d
23 364 (Nev. 1986). Ex. 238, p. 2 (#24). Bryant notes that the Constitution requires that a guilty plea be
24 knowing and voluntary. 721 P.2d at 366. Even though petitioner did not present the claim to the
25 Nevada Supreme Court as an issue of federal law, that court’s use of federal law effectively exhausted
26 ground 1. Peterson, 319 F.3d at 1158; Sandgathe v. Maass, 314 F.3d 371, 376 (9th Cir. 2002).

27 In ground 2, petitioner argues that he was denied his right to file a direct appeal because of
28 ineffective assistance of counsel. The court is not persuaded by respondents’ argument that petitioner

1 failed to raise this claim in his state habeas corpus appeal. See Ex. 234 (#34). Petitioner did not raise
2 the issue in that appeal because the state district court had granted him relief on the claim. See Ex. 209.
3 Petitioner could hardly appeal a decision in his favor; he simply mentioned that the district court
4 correctly decided that he was denied his right to a direct appeal. Ex. 234, p. 14 (#34). Respondents did
5 not contest the district court’s decision. Instead, both parties focused on whether the district court gave
6 petitioner the correct remedy. Ex. 234, pp. 10-14 (#34); Ex. 236, pp. 6-7 (#24). The exhaustion of
7 ground 2 is moot because ground 2 itself is moot.

8 In ground 3, petitioner argues that counsel provided ineffective assistance, in violation of the
9 Sixth Amendment, because counsel did not investigate and present potential mitigating evidence: Eight
10 named witnesses who would have testified that petitioner is not a threat to society, is not violent, and
11 thus does not deserve a life sentence. Petitioner also argues that counsel failed to explain to petitioner
12 what would constitute mitigating evidence and the consequences of not presenting mitigating evidence.
13 Petitioner argues that presentation of mitigating evidence might have led to a lesser sentence, i.e., a
14 definite term of 50 years with parole eligibility after 20 years plus an equal and consecutive sentence for
15 use of a deadly weapon. See Nev. Rev. Stat. § 200.030(4)(b)(3).

16 In state court, petitioner raised this claim as ground 5 of his supplemental petition. Ex. 171, pp.
17 6-8 (#23). State supplemental ground 5 and federal ground 3 are virtually identical. The state district
18 court determined that an evidentiary hearing was necessary on this claim. Ex. 181, p. 2 (#24). Trisha
19 Rice testified at the evidentiary hearing, and respondents argue that petitioner did not mention seven
20 other people in his opening brief in his state habeas corpus appeal. “[N]ew factual allegations do not
21 render a claim unexhausted unless they ‘fundamentally alter the legal claim already considered by the
22 state courts.’” Chacon v. Wood, 36 F.3d 1459, 1468 (quoting Vasquez v. Hillery, 474 U.S. 254, 260
23 (1986)). The operative facts of this claim were before the state courts. Petitioner tailored his argument
24 on appeal to the testimony at the evidentiary hearing, but nothing indicates that he dropped the rest of
25 his claim. Ground 3 is exhausted.

26 Respondents also note that petitioner did not mention in his state habeas corpus appeal that his
27 Fifth, Eighth, or Fourteenth Amendment rights were violated. Except for the incorporation of the Sixth
28 Amendment to state-court criminal proceedings through the Fourteenth Amendment, none of these

1 provisions of the Constitution are relevant to a claim of ineffective assistance of counsel. The court will
2 not consider them anyway with respect to ground 3.

3 In ground 4, petitioner claims that the remedy afforded for the denial of his direct appeal was a
4 constitutionally inadequate substitute for a direct appeal. As noted above, the state district court allowed
5 the parties to submit supplemental briefs, raising direct-appeal issues in the state habeas corpus action.
6 Ex. 206, pp. 79-82 (#24). The state district court denied relief on the issues that petitioner raised. Ex.
7 220 (#24). On appeal to the Nevada Supreme Court, petitioner argued that the correct remedy was
8 vacation of the judgment of conviction and re-sentencing, to re-start the time to file a notice of appeal.
9 Ex. 234, pp. 10-14 (#34). The Nevada Supreme Court rejected that argument, stating that the remedy
10 implemented in Lozada v. State, 871 P.2d 944 (Nev. 1994) was the functional equivalent of a direct-
11 appeal.

12 The court agrees with respondents that petitioner did not present his argument regarding the
13 adequacy of the Lozada remedy as an issue of constitutional law. Petitioner did cite decisions of federal
14 courts of appeals in support of his argument that the state district court should have vacated the
15 judgment and re-sentenced him. See Ex. 234, p. 11 (#34). Garcia v. United States, 278 F.3d 134, 137
16 (2d Cir. 2002), followed the same procedure. However, the cases cited and Garcia are all appeals from
17 the denials of motions to vacate federal-court sentences pursuant to 28 U.S.C. § 2255. In none of these
18 opinions did the courts of appeals state that vacation and re-sentencing is required by the constitution.
19 The courts of appeals appear to have ordered these remedies pursuant to their supervisory power over
20 the district courts, not pursuant to the constitution. Because petitioner did not present the constitutional
21 issue to the Nevada Supreme Court, ground 4 is unexhausted.

22 The petition (#9) is mixed, containing both claims exhausted in state court and claims not
23 exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22 (1982);
24 Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily dismiss the
25 unexhausted ground 4 and proceed with the remaining grounds, he may voluntarily dismiss this action
26 without prejudice while he returns to state court to exhaust ground 4, or he may move to stay this action
27 while he returns to state court to exhaust ground 4. If petitioner chooses the last option, he must show
28 that he has “good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and

1 there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” Rhines v.
2 Weber, 544 U.S. 269, 278 (2005).

3 Petitioner has submitted a motion for reconsideration of appointment of counsel (#27), and
4 respondents have filed an opposition (#28). Petitioner has presented nothing that would lead the court
5 to depart from its order (#8) denying his motion for appointment of counsel (#10).

6 The court vacates its order (#35) of August 11, 2010, because it duplicates an earlier order
7 (#32), and the parties have complied with the earlier order (#32).

8 IT IS THEREFORE ORDERED that respondents’ motion to dismiss (#16) is **GRANTED** in
9 part with respect to ground 4.

10 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry
11 of this order to do one of the following: (1) inform this court in a sworn declaration that he wishes to
12 dismiss ground 4 of his petition (#9), and proceed only on the remaining grounds for relief, (2) inform
13 this court in a sworn declaration that he wishes to dismiss his petition (#9) to return to state court to
14 exhaust his state remedies with respect to the claims set out in ground 4 of his petition (#9), or (3) move
15 to stay this action while he returns to state court to exhaust his state remedies with respect to the claims
16 set out in ground 4 of his petition (#9). Failure to comply will result in the dismissal of this action.

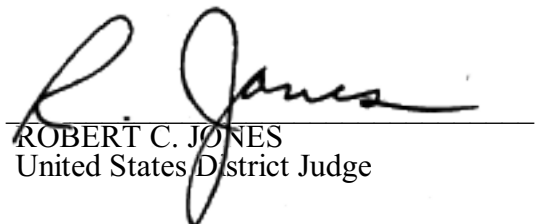
17 IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds of
18 his petition (#9) and proceed on the remaining grounds, respondents shall file and serve an answer or
19 other response to the remaining grounds within forty-five (45) days after petitioner serves his declaration
20 dismissing those grounds. If respondents file and serve an answer, it shall comply with Rule 5 of the
21 Rules Governing Section 2254 Cases in the United States District Courts.

22 IT IS FURTHER ORDERED that if respondents file and serve an answer, petitioner shall have
23 forty-five (45) days from the date on which the answer is served to file and serve a reply.

24 IT IS FURTHER ORDERED that petitioner’s motion for reconsideration of appointment of
25 counsel (#27) is **DENIED**.

26 IT IS FURTHER ORDERED that the court’s order (#35) of August 11, 2010, is **VACATED**.

27 Dated: This 24th day of August, 2010.

28

ROBERT C. JONES
United States District Judge